

PROPOSED

Rules for Public Employee Protection Act Complaints

(Pursuant to 4 GCA § 4503)

(aka Whistleblower Complaints)

**GOVERNMENT OF GUAM
CIVIL SERVICE COMMISSION**

**PROPOSED
RULES FOR PUBLIC EMPLOYEE PROTECTION ACT COMPLAINTS
(PURSUANT TO 4 GCA § 4503)
(aka Whistleblower Complaints)**

RULE 1: JURISDICTION

The Civil Service Commission is empowered to create these Rules pursuant to 4 GCA §§ 4502(e), 4105, (4403(i)), and 4409.

RULE 2: PURPOSES

The purpose of these Rules is to create a fair process with which to adjudicate Complaints filed pursuant to 4 GCA § 4503.

2.1 Unrepresented Party

The Personnel Board shall adjust the application of these Rules for any party who is not represented by a lawyer or a lay representative when it is clear there is a genuine misunderstanding of a rule(s) which, if applied, would operate unfairly.

RULE 3: CITATION

These Rules may be cited as the "Public Employee Protection" (PEP) Rule, and then the number: "CSC PEP R. #"

3.1 Citation to Laws as Rules

Many of these Rules paraphrase existing laws.

3.2

The reason certain laws are paraphrased as Rules is that Employees who desire to take this action, would be given a copy of these Rules. The Civil Service Commission believes it is important that the employee be aware of such laws and rules.

RULE 4: DEFINITIONS

(a) Agency:

Means any board, commission, department, division, section or other agency of the Executive Legislative or Judicial Branch of the government of Guam.

- (b) Disciplinary Action: *Means any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty.*
- (c) Disclosure of Information: *Means the written provision of evidence to any person, or the testimony before any committee of the Guam Legislature, regarding any action, policy, regulation, practice or procedure, including, but not limited to, the waste of public funds, abuse of authority or mismanagement of any agency.*
- (d) Employee: *Means any person employed by an agency.*
- (e) Personnel Board: *Means the Civil Service Commission, the Judicial Council or other government entity charged with hearing the appeal of a classified employee pursuant to Section 4105 of this Chapter or under the personnel rules governing such employee.*
- (f) Supervisor: *Means any board, commission, department head, division head or other person who supervises or is responsible for the work of one (1) or more employees.*

See: 4 GCA § 4502.

RULE 5: ACTION AGAINST THE EMPLOYEE PROHIBITED

- (a) Except as provided in (b) of this Rule, no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee's disclosure of information. This Section shall not apply to:
 1. An employee who discloses information that he knows to be false or who discloses information with disregard for the truth or falsity thereof;
 2. An employee who discloses information from public records which are closed to public inspection pursuant to Chapter 10 of Title 5, Guam Code Annotated;
 3. An employee who discloses information which is confidential under any other provision of law.
- (b) It shall be the obligation of an employee who wishes to disclose information under the protection of this Article to make a good faith effort to provide to his supervisor or appointing authority or member of the Guam Legislature, the information to be disclosed prior to the time of its disclosure.

See: 4 GCA § 4503.

RULE 6: STANDARD FOR FILING AN ACTION BY CLASSIFIED EMPLOYEES

Once a complaint is filed with the Civil Service Commission and prior to the Personnel Board reviewing a complaint, an assessment shall be undertaken by the Executive Director and the staff.

The Executive Director shall determine through its assessment whether the employee demonstrated reasonable communication to his supervisor, appointing authority or member of the Guam Legislature with regards to the alleged violation as indicated in Rule 6(b).

Such efforts should include such items as phone log records, written memorandums, or any oral acknowledgement, or acknowledgement of receipt of complaint by the supervisor or appointing authority or to a member of the Guam Legislature.

If the Executive Director determines that there was no reasonable communication made, and the Civil Service Commission agrees with this determination, the matter will be terminated.

See: 4 GCA § 4504.

RULE 7: PROCESS FOR INVESTIGATING THE COMPLAINT

Once the Employee has established that reasonable communication was made, the Personnel Board shall cause an investigation to be made of the charges of the complaint to determine whether there is a reasonable basis for the complaint. The Executive Director shall inform the Personnel Board as to the results of this investigation.

1. The Civil Service Commission will provide Management and Employee all documents obtained in its assessment to determine they are no violations of Rule 5.
2. The Personnel Board will, if the investigation establishes that there is a reasonable basis for the charges, inform the appointing authority or supervisor of the charges and shall be given written notice thereof along with any recommendation made.
3. Within ten (10) days after receiving such notice, the appointing authority or supervisor may petition the Personnel Board for a hearing on the matter. The Personnel Board shall grant such hearing.
4. If the Executive Director determines that no reasonable basis for the complaint exists, and the Personnel Board agrees with this determination, the matter will be terminated.

See: 4 GCA § 4504.

7.1: Cooperation with the Civil Service Commission

All agencies and departments to whom an investigation is undertaken, shall immediately and fully cooperate with all requests made by the Civil Service Commission staff. Any unreasonable delay or refusal to cooperate will be cause to determine that a violation did take place and for the Civil Service Commission to issue any appropriate remedy as described in Rule 9 below.

RULE 8: SANCTIONS BY PERSONNEL BOARD

The Civil Service Commission, after bearing the complaint, determines that a violation of Section 4503 of 4 GCA and these Rules did occur, or if the alleged agency or department fails to cooperate with the Civil Service Commission, or if the investigation establishes a reasonable basis for the charges and no hearing is requested, the Civil Service Commission may order appropriate relief. Such relief shall include, but not limited to the following:

1. Reinstatement, and/or
2. Back pay, and/or
3. Restoration of lost service credit; and/or
4. Expungement of the records of the employee who disclosed information, and/or
5. Reimbursement for any costs incurred in the proceedings. Such reimbursement shall be made out of moneys appropriated to the agency which employs such employee.

RULE 9: COMPUTATION OF TIME

Whenever these Rules or orders of the Personnel Board provide for a time period of ten (10) or less days, weekends and government of Guam holidays are not to be included in the computation. Whenever these Rules provide for a time period over ten (10) days, weekends and government of Guam holidays are to be included in the computation. For purposes of filing a Notice of Appeal, if the last day falls on a weekend or holiday, the document shall be accepted on the next business day following the weekend or holiday.

The first day of a time period commences with the day after a party receives a document or order which contains a time period.

RULE 10: TIME FOR FILING COMPLAINT

Any employee who feels aggrieved by the retaliatory action as described in 4 GCA § 4502(b) by the appointing authority or supervisor for alleging a violation of 4

GCA § 4503, must file a complaint in writing with the Personnel Board, during normal working hours, within twenty (20) days of the action.

10.1: Filing Past the Twenty (20) Day Period

The Personnel Board may excuse the filing of a complaint beyond the twenty (20) day period if the Employee proves a compelling reason for the employee's failure to timely file.

RULE 11: HEADING OF COMPLAINT

The Notice of Complaint shall be the following format:

**CIVIL SERVICE COMMISSION
PERSONNEL BOARD
GOVERNMENT OF GUAM**

(Name of Employee)

EMPLOYEE

Vs.

**PUBLIC EMPLOYEE PROTECTION
COMPLAINT**

(Department of Agency/Department)
MANAGEMENT

11.1 Contents

The Complaint shall be a brief, plain statement, either typed or hand-written, stating why the Employee believes the Complaint is justified. The parties to the Complaint are to be identified as the EMPLOYEE and as MANAGEMENT. The Employee and Management to an action are collectively referred to as the "parties".

11.2 Right of Employee Who Files a Complaint

The Employee shall:

- a) have reasonable time to prepare his case, if on duty;
- b) have the right to be represented by an attorney at his own cost, lay representative, or represent himself; and
- c) not suffer from Management any restraint, coercion, discrimination or reprisal for filing the complaint.

RULE 12: HEARING OF COMPLAINT

Should the appointing authority request for a hearing, the hearing shall be heard as quickly as possible. The burden of proof on the merits is on Employee to show that the action of the appointing authority was improper. The hearing will be conducted so as to bring out the pertinent facts.

12.1 Pre-Hearing Conference

At least four (4) weeks before the hearing on the merits at a designated time by the Executive Director or his designee, the parties shall meet with the Executive Director or his designee at a pre-hearing conference to finalize witness lists and exhibits, and to discuss stipulation or other matters that may expedite the hearing on the merits.

12.2 Discovery

The Civil Service Commission's Executive Director or his designee shall control the nature and scope of discovery between the parties, including, but not limited to, the following:

1. Issuing orders compelling discovery;
2. Issuing orders limiting the scope and nature of discovery;
3. Issuing orders establishing dates for completion of discovery; and
4. Issuing protective orders regarding discovery.

12.3 Review of Discovery Order

Any order regarding discovery that is issued by the Executive Director or his designee is subject to review by the Personnel Board, if the party requests such a review by filing an appropriate motion with the Civil Service Commission within forty-eight (48) hours (holidays and weekends excluded) of receipt of the order.

RULE 13: CONDUCT OF HEARING

The hearing shall be open to the public.

RULE 14: OATH

The testimony is under oath or affirmation

RULE 15: RULES OF EVIDENCE

The Rules of Evidence, Title 6 of the Guam Code Annotated shall not apply. The only grounds for excluding any proffered evidence are that the evidence is irrelevant or unduly repetitious.

RULE 16: ORDER OF PRESENTATION

The order of presentation at the hearing shall be as follows:

1. Presentation of investigation report by the Executive Director or his designee.

2. Presentation by Management of evidence in defense or rebuttal.

RULE 17: WITNESS

Both parties are entitled to produce witnesses.

Each party shall have the right to call, examine, or cross-examine witnesses, and introduce exhibits.

The Civil Service Commission may issue subpoena to any person to testify upon a majority vote.

Any Personnel Board member may direct relevant questions to a witness after examination of the witness has been completed by both parties; except that questions may be asked during examination by a Party to clarify a response by a witness.

The department or agency head or his designee with his department's or agency's representative shall be in attendance without subpoena on all matters presented before the Civil Service Commission. The department or agency's representative is a separate representative from that of the department or agency head's designee.

The Personnel Board may call additional witnesses; as it may deem necessary, and require the production of documents.

RULE 18: SUBPOENAS

The Chairperson of the Civil Service Commission or the Executive Director, upon their own initiative, or upon the request of any member of the Personnel Board, or upon the request of any party before the Personnel Board, may summons in writing any person to attend a meeting of the Personnel Board as a witness and, in a proper case, to bring with him any book, record, computer print-out, paper or thing which may be deemed material evidence in the case.

Subpoenas shall be served by the party who requested the issuance of the subpoena in the following manner:

1. On each other, or to the other's representative or lawyer.
2. Personal delivery, with a copy of the document acknowledged in writing to have been received; or
3. By facsimile to a representative or attorney's place of business with a confirmed receipt; or
4. Regular mail with supporting affidavit as to the date of the mailing; or certified mail with a signed returned receipt or;

5. By any method of service established by the Superior Court of Guam's Rules of Civil Procedure.

See: 4 GCA § 4404.

18.1 Subpoena Fees

The fees for such attendance shall be the same as the fees of the witnesses before the Superior Court, except that if the witness is a government employee, no witness fee shall be given. Upon motion, the fee may be waived by the Personnel Board.

The subpoena shall issue in the name of the Civil Service Commission, and shall be directed to the person and served in the same manner as subpoenas to appear and testify before the Superior Court of Guam.

18.2 Enforcement of Subpoena

If any person summoned to testify shall refuse or neglect to obey said subpoena, upon petition, the Superior Court of Guam may compel the attendance of such person before the Personnel Board, or punish said person for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the Superior Court.

18.3 Duty Status

An Employee is considered to be on duty status during the time he is made available as a witness. Such employee is entitled to compensatory time-off if he serves during a time he is not normally scheduled to work. The Personnel Board shall furnish the head of the department or agency in which the witness is employed, a certification showing the time devoted to the hearing. "Employee" does not include the parties to the appeal or their representatives.

18.4 Witness Treatment

The Personnel Board shall ensure that all witnesses are treated with courtesy and respect while giving testimony at the hearing.

The Government of Guam shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting testimony.

See: 4 GCA § 4404.

RULE 19: RECORD OF HEARING

All hearings shall be audio taped recorded by the Civil Service Commission. The Civil Service Commission's recordings and the exhibits admitted during the hearing, together with all pleading and documents filed by the parties, shall constitute the official record of a hearing.

19.1 Other Recording Methods

Still photography, filming, videotaping or audio recording of a hearing or other proceeding before the Personnel Board by any person is permitted by the Civil Service Commission only upon written motion or request.

19.2 Charge for Copies of Recording

Copies of the audio tape or digital recording of a hearing may be requested in writing from the Civil Service Commission, which will inform the requesting individual of the cost, and if agreed to by the individual making the request, then the reproduction will be made at the cost indicated.

RULE 20: LIMITATION IN THE SCOPE OF THE HEARING OF THE MERITS

The scope of the hearing on the merits shall be limited to:

1. The issue in dispute; and
2. A review of compliance with procedural requirements for affecting the complaint.

RULE 21: DELIBERATIONS

The deliberation and decision of the Personnel Board regarding the merits of action and motions shall be made in public.

RULE 22: DECISION

The Personnel Board shall decide the Complaint on the basis of the evidence presented

RULE 23: MODIFICATION OF COMPLAINT

If after the hearing, the Personnel Board determines that the initial determination of the Personnel Board needs to be modified either procedurally or substantively, it may modify accordingly. Such determination will take into account the type and amount of relief authorized under Rule 9.

RULE 24: JUDGMENT

A judgment is the final administrative adjudication of the Personnel Board on a case presented before the Personnel Board. A judgment shall be in writing and the caption shall state it is a "judgment."

The vote taken by the Personnel Board to decide an action does not constitute a judgment.

An Order of the Personnel Board is not a judgment, but of a decision made during a case presented before it.

A judgment is entered, that is, it becomes final and effective, on the date a majority of the Personnel Board member sign the judgment at a Personnel Board meeting attended by a sufficient number of Personnel Board member to constitute a quorum. Notice that a proposed judgment is before the Personnel Board for signing shall be served on the parties to the action and shall be publicly advertised as required by the Open Government Law of Guam.

A quorum of the Personnel Board shall be four (4) members.

The judgment shall recite the numerical vote of the Personnel Board in deciding an action. The signing of the judgment by the Personnel Board does not reflect how they actually voted in deciding the action. The signing of the judgment simply affirms that the judgment accurately reflects the decision that was made.

See: 4 G.C.A. § 4402

24.1 Compliance with Judgment

Within thirty (30) days of the entry any judgment that requires a department or agency to take affirmative action(s), the director or agency head shall report to the Civil Service Commission what steps he or she has taken to implement the terms of the judgment.

24.2 Request For Reconsideration or Amendment of Judgment

A party may move the Personnel Board to reconsider or amend its judgment by filing a motion with the Civil Service Commission within ten (10) days of entry of the judgment.

The filing of a motion to reconsider or amend does not affect the time limit imposed by law to file a Petition for Judicial Review with the Superior Court of Guam.

If a motion to amend or reconsider is not decided within thirty (30) days of the entry of a judgment, the motion is denied.

RULE 25: TERMINATION OF COMPLAINT

In addition to adjudication on the merits, the Personnel Board may terminate an Employee's Complaint based on the following:

1. At the Employee's request.

2. When the Employee fails to cooperate and provide information requested by the Civil Service Commission staff.

25.1 Death of Employee

If an Employee dies after he has filed a Complaint, the Complaint shall automatically be stayed for a period of up to six (6) months in order for the Estate of the Employee to apply to the Personnel Board to continue with the Complaint.

If the Estate of the Employee does not apply within the six (6) months, then the Complaint shall be automatically dismissed.

If the Estate of the Employee does apply, the Complaint will proceed. In the event that the Employee does prevail, the Estate of the Employee shall receive the compensation, but not the benefits, the Employee would have recovered up to the date of his death.

RULE 26: DEFENSE IN ANY DISCIPLINARY PROCEEDING

It shall be a defense in any disciplinary proceeding against an employee under 4 GCA Section 4406, that such proceeding was initiated in violation of 4 GCA Section 4503 and the issue of such violation shall be determined by the Personnel Board as a part of the disciplinary proceeding.

See: 4 GCA § 4504(c).

RULE 27: ACTION AGAINST APPOINTING AUTHORITY OR SUPERVISOR

Whenever the Personnel Board determines that an appointing authority or supervisor has violated 4 GCA Section 4503, it shall cause an entry to that effect to be made in the supervisor's personnel records. Additionally, such appointing authority or supervisor shall be subject to a fine of no less than five-hundred-dollars (\$500) and no more than one-thousand-dollars (\$1,000) to be determined by the PERSONNEL BOARD. Government funds shall not be used to pay such fine.

See: 4 GCA § 4504(d).

RULE 28: PRIVATE CIVIL ACTION

Any employee not in the classified service, or any employee in the classified service who has filed a complaint under 4 GCA Section 4504(a) but no reasonable basis was found for the charges, may bring a civil action in the District Court alleging a violation of 4 GCA Section 4503. If the employee prevails, the employee may recover damages, together with court costs, and the court may order such other relief as it deems appropriate.

See: 4 GCA § 4505.

RULE 29: NOTICE TO PUBLIC AUDITOR

Whenever the Personnel Board finds that a violation of 4 GCA Section 4503 involving the disclosure of information concerning waste of public funds or mismanagement of an agency has occurred, the Personnel Board shall transmit a copy of the investigation report to the public auditor, who shall proceed in accordance with 1 GCA Section 1908 and 1909. Any person found guilty of violating 4 GCA Section 4503 shall be guilty of a misdemeanor.

See: 4GCA § 4506.

RULE 30: REPORT TO THE LEGISLATURE AND GOVERNOR

The Personnel Board shall report annually to the Guam Legislature and Governor concerning the complaints filed, hearings held, and actions taken pursuant to the Act.

See: 4GCA § 4507.

RULE 31: PUBLIC DISCLOSURE

The Personnel Board recognizes the duty of disclosure must be weighed against the duty of insuring fairness for the accused. As such, Complaints and related docs that are received by the Personnel Board will not be released until a signed judgment by the Personnel Board is issued.

A judgment is the final administrative adjudication of the Personnel Board on a case presented before the Personnel Board. A judgment shall be in writing and the caption shall state it is a "judgment."

The vote taken by the Personnel Board to decide an action does not constitute a judgment.

An Order of the Personnel Board is not a judgment, but of a decision made during a case presented before it.

A judgment is entered, that is, it becomes final and effective, on the date a majority of the Personnel Board sign the judgment at a Personnel Board meeting attended by a sufficient number of Personnel Board to constitute a quorum. Notice that a proposed judgment is before the Personnel Board for signing shall be served on the parties to the action and shall be publicly advertised as required by the Open Government Law of Guam.

A quorum of the Personnel Board shall be four (4) members.

The judgment shall recite the numerical vote of the Personnel Board in deciding an action. The signing of the judgment by the Personnel Board does not reflect how they actually voted in deciding the action. The signing of the judgment simply affirms that the judgment accurately reflects the decision that was made.

RULE 32: REPRESENTATION OF EMPLOYEES BY PERSONS WHO ARE NOT ATTORNEYS

The laws of Guam permit persons who are not attorneys to represent Employees and Management before the Civil Service Commission as follows:

- a) 7 GCA Section 9215(c)(16) permits a person who is not an attorney to represent an employee before the Civil Service Commission in actions related to government service.
- b) 7 GCA Section 9215(c)(12) permits a government employee to represent a government agency in "administrative hearings" as part of such person's official duties.

32.1 Rules Relative to Representatives

A non-lawyer or attorney not licensed to practice on Guam who represents an Employee before the Personnel Board or who represents a government agency before the Personnel Board, shall be called a "Lay Representative."

All Representatives shall enter his appearance in an action by filing with the Civil Service Commission an entry of appearance which shall include the written approval of his client and shall also contain the address and telephone number of the Representative.

32.2 Entry of Appearance

By entering his appearance before the Civil Service Commission, the Representative becomes subject to the Orders and Rules of the Civil Service Commission and Personnel Board and to reasonable discipline and to contempt proceedings by the Personnel Board.

Reasonable discipline may include, but not limited to actions that the Courts may take, the following:

- a) Disqualification from appearing before the Personnel Board, so long as the disqualification does not prejudice the client's interest; and

By agreeing to be a Representative, the Representative assumes an ethical and agency relationship with the Employee that he represents. Representatives may

not be compensated for their services but may seek reimbursement for reasonable, actual costs incurred and substantiated with receipts in preparing for and appearing at hearings and status calls and conferences related to the action such as, but not limited to, photocopying costs.

32.3 Withdrawal as Representative

No Representative may withdraw from representing an Employee except upon motion, cause shown, and an Order of the Personnel Board.

32.4 Representative Required Reading

Every Representative shall agree in writing that he has read, and is familiar with 4 GCA, Chapter 4, Article 5 and these Rules and the Personnel Rules applicable to the government agency that the Employee is charging with violation of 4 GCA Section 4503.

RULE 33: MOTIONS

Since the law and rules state that the Personnel Board must determine whether or not there is a reasonable basis for the charges, once the Personnel Board determines such basis does exist, no motions other than a Motion to Postpone a Hearing, or a Motion to Allow the Hearing in the Absence of the Employee; or to Dismiss will be entertained.

33.1 Motions to Postpone Hearings

A motion to continue a date of hearings shall set forth the factual bases for the motion. Continuances based on illness, emergencies, or stipulation of the parties, may be granted without hearing by the Executive Director or his designee, if said decision may be made seven (7) days before the hearing sought to be postponed.

If in the event a hearing is requested within seven (7) days before the hearing, the parties must make the request before the Personnel Board, who will determine whether to grant such request by majority vote.

33.2 Motions to Dismiss

Motions to Dismiss a Complaint may be made on the bases of lack of jurisdiction, untimely filing of the appeal, procedural defects in the proceedings or other significant reasons. The legal and factual bases of such motions must be sufficiently set forth in the motion and supporting affidavits.

A motion to dismiss may also be made upon stipulation of the parties. A stipulated motion to dismiss, however, must be approved by the Personnel Board by an affirmative vote of four.

An Employee may dismiss his appeal with prejudice by filing a written motion to dismiss which must be signed by the Employee and his representative or attorney. The parties may settle an action, but any settlement must be approved by the Personnel Board by a majority vote before the action is dismissed with prejudice.

33.3 Motion to Allow Hearing in the Absence of the Employee

The Personnel Board may dismiss a Complaint if the Employee is not present for the hearing on the merits or a motion hearing, unless the Employee has a reasonable excuse.

A motion to permit an Employee to be absent from the hearing on the merits or motion hearing shall set for the factual basis for the motion. The Personnel Board may require affidavits in support of the motion.

RULE 34: SUBMISSION OF DOCUMENTS FOR INTRODUCTION INTO EVIDENCE

34.1 Time for Submission of Documents

Not later than twenty-eight (28) days before the hearing on the merits or on a motion hearing, or at a time designated by the Executive Director or his designee, each party shall submit to the Civil Service Commission all documents it wishes the Personnel Board to consider.

34.2 Documents to be Bound

The Documents shall be two-hole punched on the top center and bound with two-pronged fasteners and clasps. Documents shall be indexed and tabbed.

Management shall identify its documents using consecutive numbers preceded by "M" (M1, M2, M3, etc.) for every page inclusive of exhibits. Employee shall identify his documents using consecutive numbers preceded by "E" (E1, E2, E3, etc.) for every page inclusive of exhibits.

Each party shall submit eleven (11) copies of their bound documents to the Civil Service Commission.